Arab Malaysian Merchant Bank Bhd v Orient Apparel Bhd & Ors

HIGH COURT (IPOH) — COMPANIES WINDING UP NO 28–60 OF 1998
JAMES FOONG J
11 SEPTEMBER 2001

Companies and Corporations — *Winding up — Disposition of property — Preferential payments — Uplifting of fixed deposit secured under loan — Dispositions made in favour of bank to repay credit facilities within period under s 223 — Further credit resulted from agreement with liquidator to continue financing company — Whether dispositions reasonable and not dishonest or reckless — Whether dispositions were preferential payment rendering them void — Companies Act 1965 ss 293 & 223 — Bankruptcy Act 1967 s 53(1)*

Orient Apparel Bhd ('OAB') was a customer of Hong Leong Bank Bhd ('the bank'). Since May 1995, the bank had provided trade facilities to OAB, totalling RM51,700,000. Disbursements of these facilities and repayment thereto were through a current account maintained and operated by OAB with the bank. These facilities were initially secured, among others, by the deposit of third party fixed deposit receipts ('FD') by one Seow Chee Hoong. The FDs were uplifted in April 1998 to repay credit facilities extended to OAB by the bank. Sometime in February 1998, the bank discovered that majority of OAB's trade bills discounted in pursuant to credit facilities it offered to OAB were in respect of one company in Hong Kong known as Monchique Holdings Ltd ('Monchique'). Monchique had only a paid up capital of HK$1,000. To safeguard its exposure, the bank obtained from OAB further securities. Due to liquidity problem encountered by OAB, in April/May 1998, Arthur Anderson were appointed as financial consultants to OAB. It undertook to review and prepare a debt restructuring scheme for OAB. A meeting was held between the bank, Arthur Anderson and OAB. At this meeting, Arthur Anderson announced that OAB's business was still viable for next one year. To support OAB, the bank continued to make available credit facilities to OAB in order for the company to carry on with its business. To further protect itself, additional securities were obtained from OAB. After OAB went into liquidation, the liquidator (the applicant in this application) took control of its affairs. The liquidator discovered that certain dispositions by OAB to the bank might be void under s 293 of the Companies Act 1965 ('the Act') read with s 53(1) of the Bankruptcy Act 1967 ('the BA') and s 223 of the Act. To remedy this, the liquidator filed this application seeking from the court, among others, a declaration that all properties of OAB pledged as security for trade credit facilities granted by the bank to OAB constituted undue preference and should be returned to the liquidator. The issue was whether dispositions made by OAB in favour of the bank was preferential payment rendering them void under s 293 of the Act read with s 53(1) of the BA and s 223 of the Act.

Held, dismissing the application:

(1) When the FD was created, there were no transactions within the meaning of s 293 of the Act, read with s 53(1) of the BA. In fact, these instruments were not even OAB's; they were the property of a third party — Seow Chee Hong, who decided to deposit monies with the bank for safe keeping. It was only when Seow Chee Hong pledged these FDs to the bank that the transaction occurred. One cannot charge one's own indebtness. Once such transaction has taken place, any act subsequent and associated with it must be considered to have arisen out of it. Likewise, the uplifting of the FD was not an independent act but an intergral part of transaction which commenced with the pledging of the FD as collateral with the bank. Consequently, the date for the uplifting of the FD cannot be accepted as the date of the transaction since the transaction had already occurred. The uplifting being a process under the collateral cannot be considered as a transaction within the relevant provisions of the law (see p 132E–G); *Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd (Damansara Utama Branch) & Anor* [1993] 1 MLJ 119 followed. The liquidator in this case was appointed on 11 December 1998. By this time, all the FDs had been uplifted, leaving nothing for s 108(1) of the Act to bite on. Such pledges were therefore not void against the liquidator (see p 135E); *Ng Wei Teck v OCBC Ltd* [1998] 2 SLR 1 followed.

(2) The dispositions of RM8,627,507.93 taken by the bank from OAB's account to repay credit facilities within the period under s 223 of the Act arose from the bank's consent to continue to finance OAB after Arthur Anderson's report on the financial viability of OAB and a subsequent meeting between Arthur Anderson, OAB and the bank. As a result of this decision, OAB was allowed to draw on credit to finance OAB's exports against trade bills, trust receipts and foreign exchange bills. And when the instruments matured, monies generated therefrom were debited to the bank. This replishment allowed OAB to operate within its credit limit for its next and subsequent line of export. This was the nature and characteristics of this type of facility. When dispositions were made to the bank generated from this type of arrangement, the court could not see how undue preference could have been practised. These dispositions were part and parcel of a facility that benefited OAB directly and creditors generally (see p 137A–C).

(3) In addition, the bank had not acted dishonestly in accepting these dispositions or when extending such facility to OAB. And neither had the bank been reckless in arriving at such a decision. As disclosed, this decision was only resolved after the evaluation of Arthur's Anderson report which gave an optimistic view on the financial health of OAB. Besides, there was also a conference

between the bank, Arthur Anderson and OAB before the bank decided to go ahead to continue with the assistance to OAB. This summarized the bank's prudence in its action. It must be accepted that all commercial decisions come with risks, and when the outcome does not match the forecast, as was the case here, the bank could not be taken to task for the decision it made when such decisions were not dishonest or reckless. On these grounds, the bank had rebutted the presumption that these dispositions were void under s 223 of the Act (see p 137C–E).

(4) A company faced with a winding up petition should be encouraged to continue business in the ordinary way, and the court should extend indulgence to any dispositions made for payment of wages to staff and those that enable the company to carry on its business, provided they are 'reasonable disposition(s) and not dishonest or reckless'; *Re Clifton Place Garages Ltd* [1970] 1 All ER 353 followed. On the facts of the case, the liquidator's claim to declare these dispositions void and for the return of such monies was unsustainable (see p 141A–B).

Obiter:

On the allegation by the liquidator that the security documents were void for irregularity due to the absence of resolutions passed by OAB in the creation of these instruments and insufficient quorum of directors to transact them, all these could be dismissed under the Turquand rule as adopted through the case *Pekan Nanas Industries Sdn Bhd v Chang Ching Chuan & Ors* [1998] 1 MLJ 465. The liquidator had not rebutted the presumption that an outsider was not affected by the irregularity of the company. Further, the bank, who benefited from these transactions, had waived these irregularities to allow the stipulations in these documents to continue as they were; *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633 followed. And finally, under s 20 of the Act, no act or purported act of a company (including entering into an agreement) and no conveyance or transfer of property to or by the company shall be invalid by reason only of the fact that the company was without capacity or power to do or act or to execute or take the conveyance or transfer (see p 141C–F).

[Bahasa Malaysia summary

Orient Apparel Bhd ('OAB') adalah pelanggan Hong Leong Bank Bhd ('bank tersebut'). Sejak Mei 1995, bank tersebut telah memberikan kemudahan dagangan kepada OAB, berjumlah RM51,700,000. Bayaran pendahuluan kemudahan dan bayaran balik tersebut adalah melalui satu akaun semasa yang diurus dan dikendalikan oleh OAB dengan bank. Kemudahan tersebut pada mulanya terjamin, antara lain, oleh deposit resit deposit tetap ('DT') pihak ketiga oleh seorang bernama Seow Chee Hoong. DT tersebut

telah ditingkatkan dalan bulan April 1998 untuk membayar balik kemudahan kewangan yang diberikan kepada OAB oleh bank. Sekitar bulan Februari 1998, bank mendapati bahawa majoriti daripada bil-bil potongan dagangan OAB untuk tujuan mengkreditkan kemudahan yang ia tawarkan kepada OAB adalah berhubung sebuah syarikat di Hong Kong yang dikenali sebagai Monchique Holdings Ltd ('Monchique'). Monchique hanya mempunyai modal berbayar sebanyak HK$1,000. Untuk melindungi kepentingannya, bank telah mendapatkan daripada OAB jaminan selanjutnya. Oleh sebab masalah kecairan yang dialami oleh OAB, dalam bulan April/Mei 1998, Arthur Anderson telah dilantik sebagai penasihat kewangan kepada OAB. Ia menjalankan tugas mengkaji semula dan menyediakan satu skim penyusunan semula hutang untuk OAB. Satu mesyuarat telah diadakan antara bank, Arthur Anderson dan OAB. Dalam mesyuarat tersebut, Arthur Anderson mengumumkan bahawa perniagaan OAB masih berdaya maju untuk satu tahun lagi. Bagi menyokong OAB, bank terus memberikan kemudahan kewangan yang ada kepada OAB bagi tujuan syarikat tersebut menjalankan perniagaannya. Untuk mendapat lebih perlindungan, jaminan tambahan telah diperolehi daripada OAB. Setelah OAB dibubarkan, penyelesai (pemohon dalam permohonan ini) mengambil alih urusan-urusannya. Penyelesai telah mendapati bahawa pelupusan tertentu oleh OAB kepada bank mungkin tidak sah di bawah s 293 Akta Syarikat 1965 ('Akta tersebut') dibaca bersama s 53(1) Akta Kebankrapan 1967 ('AK') dan s 223 Akta tersebut. Untuk meremedikan perkara ini, penyelesai telah memfailkan permohonan ini memohon kepada mahkamah, antara lain, satu deklarasi bahawa semua hartanah OAB yang disandarkan sebagai jaminan untuk kemudahan kewangan dagangan yang diberikan oleh bank kepada OAB membentuk keutamaan yang tidak berpatutan dan sepatutnya dikembalikan kepada penyelesai. Persoalannya adalah sama ada pelupusan yang dibuat oleh OAB yang menyebelahi bank merupakan bayaran keutamaan menyebabkannya tidak sah di bawah s 293 Akta tersebut dibaca dengan s 53(1) AK dan s 223 Akta tersebut.

Diputuskan, menolak permohonan tersebut:

(1) Apabila DT dibentuk, tiada terdapat transaksi dalam maksud s 293 Akta tersebut, dibaca dengan s 53(1) AK. Walhal, suratcara-suratcara tersebut bukan kepunyaan OAB; tetapi hartanah pihak ketiga — Seow Chee Hong, yang memutuskan untuk menyimpan wang dengan bank tersebut untuk perlindungan. Hanya apabila Seow Chee Hong menyandarkan DT tersebut kepada bank barulah transaksi berlaku. Seseorang tidak boleh menggadaikan keberhutangannya sendiri. Setelah transaksi begini berlaku, apa-apa tindakan berikutnya dan berkaitan dengannya mestilah diambilkira telah timbul daripadanya. Begitu juga, peningkatan DT tersebut bukan satu tindakan yang berasingan tetapi sebahagian yang intergral

transaksi tersebut yang bermula dengan penyandaran DT tersebut sebagai kolateral dengan bank. Akibatnya, tarikh peningkatan DT tersebut tidak boleh diterima sebagai tarikh transaksi tersebut kerana transaksi tersebut telahpun berlaku. Penyandaran tersebut yang merupakan satu proses di bawah kolateral tersebut tidak boleh dianggap sebagai satu transaksi dalam lingkungan peruntukan undang-undang yang relevan (lihat ms 132E–G); *Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd (Damansara Utama Branch) & Anor* [1993] 1 MLJ 119 diikut. Penyelesai di dalam kes ini telah dilantik pada 11 Disember 1998. Pada masa ini, semua DT telah ditingkatkan, tanpa meninggalkan apa-apa untuk pemakaian s 108(1) Akta tersebut. Sandaran sebegini oleh itu adalah sah terhadap penyelesai (lihat ms 135E); *Ng Wei Teck v OCBC Ltd* [1998] 2 SLR 1 diikut.

(2) Pelupusan sebanyak RM8,627,507.93 yang diambil oleh bank daripada akaun OAB untuk membayar semula kemudahan kewangan dalam tempoh di bawah s 223 Akta tersebut telah timbul daripada kebenaran bank untuk terus membiayai OAB setelah mendapat laporan tentang daya maju kewangan OAB dan satu mesyuarat berikutnya antara Arthur Anderson, OAB dan bank tersebut. Akibat daripada keputusan ini, OAB telah dibenarkan untuk menggunakan kreditnya untuk menanggung ekspot OAB terhadap bil-bil dagangan, resit-resit amanah dan bil-bil pertukaran asing. Dan apabila suratcara-suratcara tersebut telah matang, wang yang dihasilkan daripadanya telah didebitkan ke bank tersebut. Penambahan ini membenarkan OAB untuk beroperasi dalam had kreditnya untuk keluaran ekspotnya yang berikut. Ini merupakan sifat dan ciri-ciri jenis kemudahan ini. Semasa pelupusan dibuat kepada bank yang dijanakan daripada jenis aturan ini, mahkamah tidak melihat bagaimana keutamaan yang tidak berpatutan boleh diamalkan. Pelupusan-pelupusan ini adalah sebahagian daripada kemudahan yang membawa faedah kepada OAB secara langsung dan pemiutang secara amnya (lihat ms 137A–C).

(3) Tambahan pula, bank bertindak secara jujur dengan menerima pelupusan tersebut atau semasa memberikan kemudahan tersebut kepada OAB. Bahkan bank tidak melulu semasa tiba kepada keputusan sebegini. Sebagaimana yang dikemukakan, keputusan ini hanya diputuskan setelah laporan penilaian Arthur Anderson memberikan pandangan optimistik tentang kedudukan kewangan OAB. Lagipun, terdapat satu persidangan antara bank, Arthur Anderson dan OAB sebelum bank memutuskan untuk terus memberikan bantuan kepada OAB. Ini menunjukkan sikap hati-hati bank dalam tindakannya. Ia mestilah diterima bahawa semua keputusan komersial membawa bersama risiko, dan apabila keputusan tidak serupa dengan ramalan, seperti dalam kes ini, bank tersebut tidak boleh dipertanggungjawabkan untuk keputusan yang ia telah buat apabila keputusan-keputusan

tersebut adalah jujur dan tidak melulu. Berdasarkan alasan-alasan tersebut, bank telah mematahkan andaian bahawa pelupusan-pelupusan tersebut adalah tidak sah di bawah s 223 Akta tersebut (lihat ms 137C–E).

(4) Sebuah syarikat yang berhadapan dengan satu petisyen penggulungan sepatutnya digalakkan untuk meneruskan perniagaan dengan cara biasa, dan mahkamah sepatutnya memberi kelonggaran terhadap apa-apa pelupusan yang dibuat untuk pembayaran gaji kakitangan dan yang membolehkan syarikat menjalankan perniagaannya, dengan syarat ia adalah pelupusan yang munasabah dan jujur atau tidak melulu; *Re Clifton Place Garages Ltd* [1970] 1 All ER 353 diikut. Berdasarkan fakta kes, tuntutan penyelesai untuk mengisytiharkan pelupusan tersebut tidak sah dan untuk pengembalian wang tersebut tidak boleh dibenarkan (lihat ms 141A–B).

Obiter:

Berdasarkan pengataan penyelesai bahawa dokumen-dokumen jaminan tersebut tidak sah kerana di luar aturan disebabkan oleh ketidakhadiran resolusi-resolusi yang diluluskan oleh OAB semasa pembentukan suratcara-suratcara tersebut dan kuorum pengarah yang tidak mencukupi untuk membuat transaksi, semua ini boleh ditolak di bawah peraturan Turquand sebagai mana yang diterima pakai dalam kes *Pekan Nanas Industries Sdn Bhd v Chang Ching Chuan & Ors* [1998] 1 MLJ 465. Penyelesai tidak mematahkan andaian bahawa orang luar tidak terjejas oleh luar aturan syarikat tersebut. Tambahan pula, bank tersebut, yang mendapat faedah daripada transaksi tersebut, telah mengetepikan luar aturan tersebut untuk membenarkan syarat-syarat dalam dokumen-dokumen tersebut untuk berterusan seperti sedia ada; *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633 diikut. Dan akhirnya, di bawah s 20 Akta tersebut, tiada tindakan sebuah syarikat (termasuklah memasuki satu perjanjian) dan tiada pemindahakan atau pindah milik hartanah kepada atau oleh syarikat tersebut boleh sepatutnya menjadi tidak sah hanya atas sebab fakta bahawa syarikat tersebut tiada kapasiti atau kuasa untuk membuat atau bertindak atau menyempurnakan atau memindahak atau membuat pindah milik (lihat ms 141A–B).]

Notes

For cases on disposition of property, see 3(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 790–799.

Cases referred to

Airservices v Ferrier 21 ACSR 1 (refd)

Bah Heng Hong Sdn Bhd v The Provisional Liquidator Choong Shin Cheong & Anor [1992] 3 CLJ 1421 (refd)

Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd (Damansara Utama Branch) & Anor [1993] 1 MLJ 119 (folld)
BP Fowler Ltd, Re [1937] 3 All ER 781 (refd)
Clifton Place Garage Ltd, Re [1970] 1 All ER 353 (folld)
Gray's Inn Construction Co Ltd, Re [1980] 1 All ER 814 (refd)
Hamilton v National Australia Bank Ltd [1991] 5 ACSR 432 (refd)
Hollicourt (Contracts) Ltd (In liquidation) v Bank of Ireland [2001] 1 All ER 289 (refd)
Lian Keow Sdn Bhd & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449 (refd)
Ng Wei Teck Michael & Ors v Oversea-Chinese Banking Corp Ltd [1998] 2 SLR 1 (folld)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465 (folld)
Sandell v Porter (1966) 115 CLR 666 (refd)
Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (in liquidation) [1998] 4 MLJ 569 (refd)
Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 633 (folld)
Washington Diamond Mining Co, Re [1893] 3 Ch 95 (refd)
Wiltshire Iron Co, Re (1868) 3 LR Ch 443 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 41, 53(1)
Companies Act 1965 ss 108(1), (3)(k), 223, 293

Prakash Menon (*Steven Puung* with him) (*Isharidah Ho Cheng & Menon*) for the applicant.
Christopher Leong (*TS Lim* with him) (*Chooi & Co*) for the respondent.

James Foong J: Orient Apparel Bhd ('OAB'), a public registered company involved in the manufacturing and export of goods, was wound up on 6 December 1998 by a creditor's petition presented on 4 August 1998.

OAB was a customer of Hong Leong Bank Bhd ('the bank'). Since May 1995, the bank had provided trade credit facilities to OAB, totaling RM51,700,000. These facilities were granted by the bank pursuant to several letters of offer made to OAB between 1995 to 1997. Disbursements of these facilities and repayment thereto were through a current account maintained and operated by OAB with the bank. These facilities were initially secured:

(a) by the deposit of third party fixed deposit receipts ('FD') held in the name of one Seow Chee Hoong;

(b) a joint and several guarantee by Seow Chee Hoong and one Chen Mee Mee in favour of the bank;

(c) a deed of assignment and a power of attorney in favour of the bank of landed property known as Lot RKA 8 & 9 Bandar Baru Kundang, Rawang;

(d) the setting up of a sinking fund where 5% of the proceeds of each export/trade bill of OAB would be deducted and placed in the FD as security.

Sometime in February 1998, the bank discovered that majority of OAB's trade bills discounted in pursuant to the credit facilities it offered to OAB were in respect of one company in Hong Kong known as Monchique Holdings Ltd ('Monchique'). Monchique had only a paid up capital of HK$1,000. To safeguard its exposure, the bank obtained from OAB further securities. These were:

(a) a loan agreement between OAB and the bank dated 10 April 1998;

(b) a debenture dated 10 April 1998 which creates a first fixed and floating charge over the assets of OAB;

(c) an account assignment dated 10 April 1998 in respect of the FD held by OAB with the bank;

(d) a supplementary loan agreement between OAB and the bank dated 4 May 1998.

Due to liquidity problem encountered by OAB, in April/May 1998, Arthur Anderson were appointed as financial consultants to the company. It undertook to review and prepare a debt restructuring scheme for OAB. From this exercise, Arthur Anderson prepared two reports dated 23 June 1998 and 21 July 1998 respectively. These reports were distributed to OAB creditors including the bank.

According to the bank, a meeting was held between them, Arthur Anderson and OAB. At this meeting, Arthur Anderson announced that OAB's business was still viable for the next one year. To support OAB, the bank continued to make available the credit facilities to OAB in order for the company to carry on with its business. To further protect itself, additional securities were obtained from OAB. These were:

(a) a letter of assignment dated 18 June 1998 whereby OAB agreed to channel all export bills and proceeds therefrom to the bank;

(b) a second supplementary loan agreement between OAB and the bank dated 1 October 1998.

The liquidator's claim

After OAB went into liquidation, the liquidator (the applicant in this application) took control of its affairs. He discovered that certain dispositions by OAB to the bank might be void under s 293 of the Companies Act 1965 ('the Act') read with s 53(1) of the Bankruptcy Act 1967 ('the BA') and s 223 of the Act. To remedy this, he has filed this application (encl 110) seeking from this court the following:

(1) a declaration that all properties of OAB pledged as security for trade credit facilities granted by the bank to OAB constitute rence and should be returned to the liquidator;

(2) a declaration that all monies withdrawn and paid out to the bank between 4 February 1998 to 6 December 1998 under the current account operated by OAB with the bank constituted undue preference;

(3) a declaration that all monies credited to the current account of OAB with the bank between 4 August 1998 and 6 December 1998 constituted undue preference and are therefore void;

(4) alternatively, all monies debited to the account of OAB with the bank between 4 August 1998 and 6 December 1998 constituted undue preference and are void;

(5) the bank to account for all monies handled by them under prayers (2), (3) and (4) above, and thereafter be returned to the liquidator.

The bank's stand

The bank denies that the dispositions mentioned are void and insists that the bank is not liable to account and return any monies to the liquidator.

Issues

Based on the contentions above, the issue in this case is whether the dispositions made by OAB in favour of the bank are preferential payment rendering them void under s 293 of the Act, to be read with s 53(1) of the BA and under s 223 of the Act.

Subject matters in contention

Realizing that the transactions between the bank and OAB, within the time span in question, cover a wide range of matters, Mr Prakash, counsel for the liquidator, in his submission, has confined the liquidator's claim to only the following dispositions:

(a) loan repayments by OAB to the bank from the FD belonging to Seow Chee Hong;

(b) loan repayment by OAB to the bank through debit advice;

(c) bank charges on trade bills and overdraft (OD) facilities granted by the bank to OAB;

(d) execution of security documents by OAB or third party in favour of the bank.

Particulars of subject matters in contention

For consideration of this case, it is necessary to set out the particulars of each subject matter under contention.

(a) FD

(1) There is a sum of RM18,688,647.57 in various FDs deposited by Seow Chee Hoong with the bank before 4 February 1998 which were subsequently uplifted by the bank in April 1998 to repay the credit facilities extended to OAB by the bank.

(2) A sum of RM55,887.92 in several FDs deposited by Seow Chee Hoong with the bank after 4 February 1998 which were also uplifted by the bank in April 1998 to repay credit facilities extended to OAB by the bank.

(b) Debit advice

(1) A sum of RM8,627,507.93 was taken from OAB's account by the bank to repay credit facilities utilized by OAB between 5 August 1998 to 6 December 1998.

(2) A sum of RM20,018,429.30 was taken from OAB's account by the bank to repay credit facilities utilized by OAB between 4 February 1998 to 4 August 1998 ('the twilight period').

(c) Trade bills & OD charges

(1) A sum of RM49,537.99 and RM9,299.41 respectively levied by the bank as charges on trade bills and OD utilized by OAB between 5 August 1998 and 6 December 1998.

(2) A sum of RM139,849.85 and RM1,695.56 respectively levied by the bank on trade bills and OD utilized by OAB between 4 February 1998 and 4 August 1998 ('the twilight period').

(d) Security documents

(1) Execution of a loan agreement dated 10 April 1998 for facilities extended to OAB by the bank.

(2) Creation of a debenture for a first legal and floating charge over assets of OAB in favour of the bank on the 10 April 1998 (within the twilight period).

(3) Execution by OAB of an account assignment dated 10 April 1998 in favour of the bank (within the twilight period).

(4) Execution of a supplementary loan agreement OAB in favour of the bank on the 4 May 1998 (within the twilight period).

(5) Execution by OAB of a letter of assignment dated 18 June 1998 (within the twilight period) in favour of the bank to channel all export bills and proceeds of OAB to the bank.

(6) Execution by OAB of a second supplementary loan agreement dated 1 October 1998 in favour of the bank.

The applicable law

For the determination of the issues in this case, the pertinent laws are s 223 of the Act, and s 293 of the Act to be read with s 53(1) of the BA. These are set out below:

Section 223 of the Act states:

Avoidance of dispositions of property, etc

Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the

A company made after the commencement of the winding up by the court shall unless the court otherwise orders be void.

And s 293 of the Act provides:

Undue preference

B (1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in the like manner.

(2) For the purposes of this section the date which corresponds with the date C of presentation of the bankruptcy petition in the case of an individual shall be —

(a) in the case of winding up by the court —

(i) the date of presentation of the petition.

Then s 53(1) of the BA declares:

D

Avoidance of preference in certain cases

Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts, as they become due, from his own money in favour of any creditor or any person in trust for any creditor E shall be deemed to have given such creditor a preference over other creditors if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same and every such act shall be deemed fraudulent and void as against the Official Assignee.

F Undeniably, the objective of these provisions is to prevent a creditor from obtaining for himself an unfair advantage at the expense of other creditors by concluding transactions during these periods.

Applicable period

G By the nature of the laws to be applied, there are two important periods to bear in mind:

(1) Between 5 August 1998 (a day after the filing of the winding up petition) and 6 December 1998 (the date of the winding up). For this period, the provision in s 223 of the Act shall apply. For ease of H reference, I shall refer to this period as 'the period under s 223'.

(2) Between 4 February 1998 (six months from the date of presentation of winding up petition) and 4 August 1998 (the date of the filing of the winding up petition), for this period, the law as laid down in s 293 of the Act, read with s 53 (1) of the BA shall apply. This stretch of time is commonly known as the 'twilight period' for the simple reason that I one is uncertain whether the company will be wound up or continue to function. Again for ease of reference, I shall use this term to refer to this time frame.

Analysis

I shall deal with each of the items in contention separately, beginning with:

(a) FD

(i) The sum of RM18,688,647.57

These FDs were all taken before the twilight period but uplifted in April 1998 (during the twilight period). Since they were created outside the period in question, the bank contends that these are not liable for consideration under s 293 of the Act, to be read with s 53(1) of the BA.

The liquidator disagrees and insists that the period of transaction must be the time when these FDs were uplifted. For support, the liquidator cited: *Bah Heng Hong v The Provisional Liquidator* [1992] 3 CLJ 1421; *Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd (Damansara Utama Branch) & Anor* [1993] 1 MLJ 119 and *Lian Keow Sdn Bhd & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449.

Of these three cases, my view is that the principle stated in *Bensa* is most appropriate for application to the present circumstances. This is for reason that similar to the facts of the present case, an FD was used as security for financial facilities granted. In *Bensa*, the High Court declared that the date of transaction was the time when the FD was charged as collateral to the insurance company, not at the time when it was created. This, I believe is the correct approach. When the FD in this case was created, there were no transactions within the meaning of s 293 of the Act, read with s 53(1) of the BA. In fact, these instruments were not even OAB's; they were the property of a third party — Seow Chee Hong, who decided to deposit monies with the bank for safe keeping. It was only when Seow Chee Hong pledged these FDs to the bank that the transaction occurred. As correctly pointed out by Mr Christopher Leong, counsel for the bank, one cannot charge one's own indebtedness. Once such transaction had taken place, any act subsequent and associated with it must be considered to have arisen out of it. Likewise, the uplifting of the FD was not an independent act but an integral part of the transaction which commenced with the pledging of the FD as collateral with the bank. Consequently, the date for the uplifting of the FD cannot be accepted as the date of the transaction since the transaction had already occurred. The uplifting, being a process under the collateral, in my view, cannot be considered as a transaction within the relevant provisions of the law under discussion. For this, I must reject the liquidator's approach that the date of uplifting of the FD was the date of the transaction.

Once this time factor is decided, attention must be concentrated on when the collateral was created over these FD. From the particulars as set out in p 25 of the encl 116 at item 2.7, it is disclosed that these FDs were 'pledged as security pursuant to letters of offer dated 17 May 1995, 25 October 1995, 6 December 1996 & 19 September 1997'. All these dates were outside the twilight period, exempting this transaction from scrutiny under the relevant provisions of the law.

A As a precaution, in the event that I may have erred on this point, I shall proceed to consider other arguments raised by the bank to counter the liquidator's claim for this item.

It is the view of the bank that even if the transaction is considered to be at the time when the FDs were uplifted, these FDs would still be exempted B from consideration for undue preference because the bank had a lien over them. Arising from this lien, the bank asserts that it had a common law and statutory right (by way of s 41 of the BA) to set off this against any sum due by OAB to the bank. To support this assertion, the Federal Court's decision of *Sime Diamond Leasing (M) Sdn Bhd v Precision Moulding Industries Sdn Bhd (in liquidation)* [1998] 4 MLJ 569 is relied on.

C Not willing to concede, the liquidator however argues against the availability of this protection by the bank on two fronts. Firstly, the common law right of a lien over the FD was extinguished by the failure to register these FDs as charges under s 108(3)(k) of the Act. Secondly, without this support, the bank's common law right of a set off could not have existed. As D to the statutory right of a set off under s 41 of the BA, the liquidator insists that this provision cannot override s 293 of the Act, read with s 53(1) of the BA. In short, the liquidator is defiantly asserting that *Sime Diamond Leasing* was incorrectly decided. As an alternative, the liquidator presents that even if s 41 of the BA predominates s 293 of the Act, to be read with s 53(1) of the BA, there is no evidence to support the existence of 'mutual credits and E mutual debts or mutual dealings' at the material time between OAB and the bank to qualify the use of this provision.

Whether the FD needed to be registered under s 108(3)(k) of the Act is a point I have already decided in the case of *Bensa*. As explained, these FDs were only evidence of acceptance of deposits of Seow Chee Hong by the bank. It was only when they were used as securities that they fell within F the category of 'a charge on the credit balance of the company in any deposit account' as described in s 108(3)(k) of the Act. Thus, standing by itself, these FDs were not caught under s 108(3)(k) of the Act, but the pledging of these as securities were.

When such collateral was not registered, they are void against the G liquidator — s 108(1) of the Act. This statutory enactment must, in my view, overrides the bank's right to a lien under common law over these securities. Consequently, as argued, the bank's common law right to a set off cannot be maintained for having no basis to rely on.

But what about the bank's statutory right of set off under s 41 of the H BA? To examine this prerogative, which is often referred to as 'insolvency set off', s 41 of the BA must first be looked into. It says:

> Mutual credit and set-off
>
> (1) Where there had been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made under this Act and any other person proving or claiming to prove a debt under I such order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from one party shall be set-off against any sum due from the other party, and the

balance of the account and no more shall be claimed or paid on either side respectively. A

(2) A person shall not be entitled under this section to claim the benefit of any set-off against the property of the debtor in any case where he had at the time of giving credit to the debtor notice of an act of bankruptcy committed by the debtor and available against him? B

By virtue of this section, when mutual credits and mutual debits or other mutual dealings are apparent, insolvency set off is permitted. But this runs contrary to s 293 of the Act, read with s 53(1) of the BA. The Federal Court when encountered with this issue, decided in *Sime Diamond Leasing* to adopt the approach of where s 41 of the BA applies, the payment or agreement for a set off cannot be construed as a void preference under s 53 of the BA. C

To support this, Edgar Joseph Jr FCJ at p 581 of the same judgment explains:

> Similarly, it is important to note that the case of *Re Washington Diamond Mining Co* (1893) 3 Ch 95 recognises that where s 41 of the Bankruptcy Act applies, the payment or the agreement for a set-off cannot be construed as a void preference under s 53 of the Bankruptcy Act. It has been said that in such a situation the fact that the debts would have been set-off in the bankruptcy means that the arrangements have not worked to the detriment of the other creditors of the company. As well put by Vaughan Williams J in *Re Washington Diamond Mining Co* at p 104, 'You cannot prefer a man ... by merely putting him in the very position in which he would be if a bankruptcy followed'. D E
>
> This case should be compared with *Re BP Fowler Ltd* [1937] 3 All ER 781, where Crossman J held that the payment was a preference notwithstanding that he left open the question whether there would have been a set off in liquidation, and on this ground his judgment may be regarded as unsatisfactory. F

But Mr Prakash boldly points out that that this ruling was decided per incuriam. It has overlooked the reversal of Vaughan Williams J's decision of first instance by the English Court of Appeal in *Re Washington Diamond Mining Co*. I tend to agree with this view. As stated by Kay LJ in the Court of Appeal in *Re Washington Diamond Mining Co* at p 113: G

> The first question is as to the meaning and the effect of 164 section (an earlier version of our s 293 of the Companies Act) of the Companies Act 1862. It is argued that this section only makes that a fraudulent preference which would be so if the company were an individual who has since become a bankrupt, and that in the case of such an individual any of his debtors who had a counter claim against him which might be set off in an action may be relieved of such debt by voluntary set off by the bankrupt before bankruptcy. If this be so, it is by reason of the mutual credit clause, s 38 (similar to our s 41 of the Bankruptcy Act) of the Bankruptcy Act 1883. The effect of that clause is to give the debtor after bankruptcy the advantage of set off, and therefore, to set off the debt before the bankruptcy cannot be in any sense fraudulent. But after a winding up there is no such right of set off, and, therefore to allow a set off before a winding up does confer on the debtor an advantage which may be deem to be fraudulent under s 164. H I

> I am unable to read the section as this argument requires us to do. Its object is to prevent a fraudulent preference. If it has the meaning suggested, the case of a voluntary set off must be an unintentional omission in the statute. But I do not think there is any such omission. I think s 164 should be read as meaning that any preference by way of a set off of a debtor who would have no right of a set off after winding up shall be treated in bankruptcy if he had no right to set off after bankruptcy, and if such a set off would be a fraudulent preference in bankruptcy it shall be so in a winding up.

By this, it would mean that s 41 of the BA does not apply in a situation where s 293 of the Act read with s 53(1) of the BA operates. Taken in the context of our case, this would mean that the bank is not entitled to the set off as claimed.

To save itself, the bank advanced another argument: that even if the charge instruments were not registered under s 108(3)(k) of the Act and that the set off (both the common law and statutory type) was not available to the bank they are only void against the liquidator at the time when the liquidator was appointed. In this case, when the liquidator was appointed, the FDs have all been uplifted, leaving the liquidator no opportunity to lay his hands on them. To support this, the Singapore Court of Appeal's case of *Ng Wei Teck v OCBC Ltd* [1998] 2 SLR 1 is cited. There, the court held that under a similar provision to our s 108(1) of the Act, the effect of the non-registration of a charge is only void against the liquidator at the time when the liquidator was appointed.

I see no reason why this authority should not be adopted in view of the wordings of our s 108(1) of the Act which are the same as that of the Singapore equivalent. The liquidator in this case was appointed on 11 December 1998. By this time, all the FDs had been uplifted, leaving nothing for this provision to bite on. Such pledges, I find, are therefore not void against the liquidator.

(ii) The sum of RM55,887.92 FD

These were deposits made by Seow Chee Hong with the bank after 4 February 1998, but similar to those FDs of the earlier period, were uplifted in April 1998. By deduction, pledges of these FDs as security would have taken place between the time when the monies were deposited with the bank and the uplifting of these FDs. This puts the creation of these collateral well within the twilight period and the ambit of s 293 of the Act, to be read with s 53(1) of the BA. Applying the same rational as above, these pledges, though not registered under s 108(3)(k) of the Act, are not void since they were uplifted and spent after the appointment of the liquidator.

(b) Debit advice

(i) A sum of RM8,627,507.93 taken by the bank from OAB's account to repay credit facilities within the period under s 223 of the Act

Record of these payments is in p 66 of encl 116 under item 2.2. According to the bank, these were payments made in accordance with the terms of the credit facilities extended to OAB for settlement of trade bills, trust receipts

and foreign bills of exchange, utilized by OAB in its ordinary course of business. These were bona fide transactions and the bank possessed no knowledge of any impropriety.

Since these dispositions were after the presentation of the winding up petition, s 223 of the Act applies. Prima facie, these payments are void to prevent improper alienation and dissipation of the property of the company *in extremis* but:

> When a company actually trading, which is the interest of every one to preserve, and ultimately to sell, as a going concern, is made the object of a winding up petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its current trade, bona fide entered into and completed, would be avoided, and would not, in the discretion given to the court, be maintained, the result would be that the presentation of a Petition, groundless or well — founded, would, ipso facto, paralyze the trade of the company, and great injury, without the counterbalance of advantage, would be done to those interested in the assets of the company' — per Lord Cairns LJ in *Re Wiltshire Iron Co* (1868) LR 3 Ch 443 at p 447.

In more recent times, the courts in England have expressed harshness of this provision and recommended some form of relaxation in its approach. This can be seen from the judgement of Phillimore LJ in *Re Clifton Place Garage Ltd* [1970] 1 All ER 353 at p 359:

> This is a very harsh section as applied. We were told that the first result of a petition seeking an order for winding up of a company by the court is that its bank refuses to honour its cheques, although it will continue to accept receipts in its favour. It follows that, even in a case of a company where the court ultimately refuses the order, serious damage may have resulted from the petition. After all, one of the results of the petition and of such action of the bank is that the company may have great difficulty in paying it employees, and, if it does pay them, the payments if derived from the funds of the company are prima facie void. All these dates from 'the good old days' where landlord and creditors came before anyone else. I am not suggesting that they should come after anyone else; but in my judgment the court should extend indulgence to any disposition by a company honestly designed to ensure that its employees are paid their wages or which was made to enable it to carry on its business and perhaps 'turn the corner'; provided always that it was a reasonable disposition and not dishonest or reckless.

Though accepting these principles enunciated as correct, the liquidator argues that the bank has not provided any proof that these debit advice were for the continuation of OAB's business and that the bank had acted in good faith. Further, there was no advantage enjoyed by OAB or its creditors on these dispositions. On the last factor, the case of *Hamilton v National Australia Bank Ltd* (1991) 5 ACSR 432 is cited, where McLelland J in the Supreme Court of New South Wales, Australia declares at p 434:

> [T]he essential question for determination is to ascertain whether overall the relevant transaction could at the time reasonably be perceived as offering some advantage, or at least potential advantage, to the company and thereby its general body of creditors. It is necessary to weigh the benefits supposed to flow to the company from the transaction against the detriment to be suffered by the general body of creditors in consequence of the transaction.

Bearing in mind the above propositions, I shall now proceed to analyze the facts of this case. These dispositions arose from the bank's consent to continue to finance OAB after Arthur Anderson's reports on the financial viability of OAB and a subsequent meeting between Arthur Anderson, OAB and the bank. As a result of this decision, OAB was allowed to draw on credit to finance OAB's exports against trade bills, trust receipts and foreign exchange bills. And when these instruments matured, monies generated therefrom were debited to the bank. This replenishment allowed OAB to operate within its credit limit for its next and subsequent line of export. This was the nature and characteristic of this type of facility. When dispositions were made to the bank generated from this type of arrangement, I cannot see how undue preference could have been practiced. These dispositions were part and parcel of a facility that benefited OAB directly and its creditors generally. It allowed OAB an opportunity to continue to trade in an attempt to 'turn the corner' so to speak. In addition, I do not believe that the bank had acted dishonestly in accepting these dispositions or when extending such credit facility to OAB. And neither do I consider the bank reckless in arriving at such a decision. As disclosed, this decision was only resolved after the evaluation of Arthur Anderson's report which gave an optimistic view on the financial health of OAB. Besides, there was also a conference between the bank, Arthur Anderson and OAB before the bank decided to go ahead to continue with the assistance to OAB. This summarizes the bank's prudence in its action. It must be accepted that all commercial decisions come with risks, and when outcome do not match the forecast, as was the case here, the bank cannot be taken to task for the decision it made when such decisions were not dishonest or reckless. On these grounds, I am satisfied that the bank has rebutted the presumption that these dispositions were void under s 223 of the Act.

(ii) A sum of RM20,018,429.30 taken during the twilight period by the bank from OAB's account to repay credit facilities

These debit advice, according to the bank, were debited from OAB's account on the same arrangement as those above (concerning the sum of RM8,627,508,93), except that these were carried out earlier. The bank added that these payments were part of bank a wider transaction and were conducted under a running account.

The liquidator, on the hand, raised the same issue of whether the bank was bona fide in carrying out these dispositions and insisted that OAB was, at this period, hopelessly insolvent making these payments preferential treatment over other creditors.

Undisputedly, this item falls within s 293 of the Act, to be read with s 53(1) of the BA for consideration. To reiterate, the design of this provision is to preserve the sanctity of the *pari passu* principle by which creditors in a winding up share rateably in the asset available for distribution. But in order for the liquidator to succeed, he must satisfy five conditions — see *Sime Diamond Leasing* and *Bensa*. These are:

(1) that the transaction in question took place within six months prior to the commencement of the winding up; A

(2) that it is the type of transaction mentioned in s 53(1) of the BA;

(3) that it took place at a time when the company was insolvent;

(4) that the person in whose favour the transaction was effected stood in the relation of a creditor to the company; B

(5) that the effect of the transaction was to confer on that person a preference, priority or advantage over other creditors in the winding up.

The onus of proving whether all these conditions are complied with is on the liquidator, not the creditor — *Sime Diamond Leasing.* C

From the submissions of the parties, I gather that only conditions 3 and 5 are questioned. The others, not being commended on, must be considered as satisfied. In any event, from the facts presented, I am of the view that they are fulfilled.

Commencing with the insolvency factor, I shall first turn to the Australian High Court case of *Sandell v Porter* (1966) 115 CLR 666 for assistance. At p 670 of the judgment, the definition of insolvency is described in the following manner: D

> The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporarily lack of liquidity. It is the E debtor's inability, utilizing such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency. Whether that state of affairs has arrived is a question for the court and not one as to which expert evidence may be given in terms though no doubt experts may speak as to the likelihood of any of the debtor's assets or capacities yielding ready cash in sufficient time to meet the debts as they F fall due.

Now turning to the evidence, I note that undoubtedly OAB was facing liquidity problems during this period. But from the outlook projected by Arthur Anderson, this could be temporary. Its reports say 'the short term viability review of the group indicates that OAB has a viable core business G with a net profit before tax exceeding RM16m before finance charges with a surplus cash flow position expected to be generated over the next twelve months'. Perusing further into Arthur Anderson's investigation, I am of the view that against the liabilities of OAB, with its assets and secured contracts, OAB was not insolvent though under enormous financial constrain. I have been reminded in the judgment of *Sandell v Porter* that the interpretation of H insolvency of a company should not be left to the experts, but in this case, I do not think it is unwise to rely on Arthur Anderson's assessment since this firm of financial consultants had the opportunity to examine and study all the relevant documents and books of accounts of OAB in the course of its evaluation of OAB's financial position at the material time. Who else would be in a better position? Further, I find no challenge mounted by the I liquidator to indicate that these reports of Arthur Anderson were in any way bias or inaccurate.

The next factor to be considered is whether this transaction was a conferment of preference, priority or advantage on the bank over other creditors of OAB.

As pointed out in Australian High Court case of *Airservices v Ferrier* 21 ACSR 1 at p 14:

> For the purpose of s 122 (similar to our s 53 of the Bankruptcy Act), the effect of a payment on the other creditors of the debtor is determined objectively. If the payment has the effect of giving a creditor a preference over other creditors, it does not matter that neither the creditor nor the debtor intended to give the creditor preferential treatment. As Starke J pointed out in *S Richard & Co Ltd v Lloyd* (1933) 49 at p 62 the section 'looks to the effect of the transaction and not to the intent, or state of mind, of the debtor'. But that does not mean that the purpose of the debtor in making a payment has no evidentiary significance.
>
> If a payment is a part of a wider transaction or a 'running account' between the debtor and the creditor, the purpose for which the payment was made and received will usually determine whether the payment has the effect of giving the creditor a preference, priority or advantage over other creditors.

In this case of *Airservices Australia v Ferrier*, a commercial airline company went into liquidation. In the six months prior to winding up, this airline company had made payments to the Civil Aviation Authority where the company operated its aircraft. Such payoffs, the liquidator of the company claimed, were undue preferential payments. The court, by majority, ruled that there was no undue preference, and stated at p 19 of the judgment that:

> [the] account was an active one with daily dealings between the parties. Services rendered during the preceding month were debited to the account at the beginning of each month. In addition, penalties for late payment were debited monthly. The balance of the account rose and fell as debits and credits were recorded. There was but one account, not a series of separate accounts for each month or for each service, ...

The factual matrix of our case is very similar to that of *Airservices*. There was a running account with credits and debits recorded. When OAB required to export its manufactured goods, it used the trade facilities granted by the bank and when these trade bills, trust receipts and foreign exchange bills matured, they were credited into OAB's account. The entire purpose of the operation was to sustain the business activity of OAB at that relevant time. I do not think that the debit advice transacted during this period has the effect, as well as, the purpose of giving undue preference to the bank. They were, as stated earlier, a normal financial business transaction to cater for a company engaged in international trade.

(c) Trade bill & OD charges

(i) RM49,537.99 and RM9,299.41 respectively incurred during the period under s 223 of the Act

> These were charges by the bank for credit facilities granted to OAB to continue with its business. The laws applicable on this subject are the same as

those discussed above under para (b) 1 of 'debit advice'. There is no necessity for me to repeat them. As for its application to the facts, I find that the bank has proved to the satisfaction of this court that these dispositions were not undue preference.

(ii) RM1,695.56 and RM139,849.85 respectively incurred during the twilight period

Again these were charges incurred in the use of the credit facilities granted by the bank to OAB for their business activities. The laws are once again that applicable to those discussed under para (b) 2 of 'debit advice' warranting no necessity to go over them again. Similarly, applying the tests as set out to the facts of this claim, I find that conditions 3 & 5, which are required to be fulfilled in order for s 293 of the Act to be read with s 53(1) of the BA to succeed, have not been satisfied by the liquidator. The claim for this item must therefore fail.

(d) Security documents

(i) Loan agreement;

(ii) debenture;

(iii) account assignment agreement;

(iv) supplementary loan agreement; all made within the twilight period.

Arising from these security documents were some of the dispositions considered by this court earlier. Once again, for the purpose of determining whether these were undue preference under s 293 of the Act read with s 53(1) of the BA, the five conditions as set out earlier (under para (b) 2 of 'debit advice') must be satisfied. To reiterate, this court is of the view that at the material time when these instruments were created, OAB was not insolvent. OAB, as discussed earlier, was facing liquidity problems but not insolvent within the concept, as laid down in *Sandell v Porter*. As the undue preference factor, from facts presented, I find no trace of mala fide on the part of the bank to secure these instruments other than to assist OAB to have an opportunity to regain its business strength. The creation of these instruments was part of this exercise as well as of a wider transaction that began way back in 1995. For the facilities to be made available, it was not uncharacteristic of the bank to obtain securities. This was in accordance with normal ordinary banking practices. I am not convinced that these were carried out to give undue preference to the bank.

The second supplementary loan agreement created under s 223

Again, the law as regards to s 223 of the Act has been spelt out earlier. But I hasten to add that the approach adopted in *Re Gray Inns Construction Co Ltd*, where banks should freeze the accounts or seize the monies of their customers facing a winding up petition, is no longer encouraged. In fact, the English Court of Appeal in *Re Clifton Place Garages Ltd* has commented that such practices are very harsh. Finally, in *Hollicourt (Contracts) Ltd v Bank of Iceland* [2001] 1 All ER 281, the same court decided that this

recommendation in *Re Gray Inns Construction Co Ltd* is no longer applicable. Presently, a company faced with a winding up petition should be encouraged to continue business in the ordinary way, and the court should extend indulgence to any dispositions made for payment of wages to the staff and those that enable the company to carry on its business, provided they are 'reasonable disposition(s) and not dishonest or reckless' — *Re Clifton Place Garage Ltd.* Based on these and the similar reasons expressed earlier on other items under contention for this same period, I find the liquidator's claim to declare this disposition void and for the return of such monies unsustainable.

Non-compliance with internal procedures of OAB

There is an allegation by the liquidator against the bank which is out of the main stream of undue preferential dispositions under s 293 of the Act, read with s 53(1) of the BA and s 223 of the Act. This relates to the security documents which the liquidator claims is void for being irregular by the absence of resolutions passed by OAB in the creation of these instruments and insufficient quorum of directors to transact them.

All these, I think, can be dismissed under the *Turquand* rule as adopted into our Malaysian law through the case of *Pekan Nanas Industries Sdn Bhd v Chang Ching Chuan & Ors* [1998] 1 MLJ 465. The liquidator has not rebutted the presumption that an outsider is not affected by the irregularity of the company. Further, the bank, who benefited from these transactions, had waived these irregularities to allow the stipulations in these documents to continue as they were — see the case of *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633 at p 654. And finally, under s 20 of the Act, no act or purported act of a company (including entering into an agreement) and no conveyance or transfer of property to or by the company shall be invalid by reason only of the fact that the company was without capacity or power to do the act or to execute or take the conveyance or transfer.

Conclusion

Based on the above, I hereby dismiss the liquidator's requests in encl 110 with costs.

Application dismissed.

Reported by Peter Ling